

1 GUIDO SAVERI (22349)
2 R. ALEXANDER SAVERI (173102)
3 GEOFFREY C. RUSHING (126910)
4 CADIO ZIRPOLI (179108)
5 SAVERI & SAVERI, INC.
6 111 Pine Street, Suite 1700
7 San Francisco, CA 94111-5619
8 Telephone: (415) 217-6810
9 Facsimile: (415) 217-6813
10 *guido@saveri.com*
11 *rick@saveri.com*

12 STEVE W. BERMAN (*pro hac vice*)
13 ANTHONY D. SHAPIRO (*pro hac vice*)
14 GEORGE W. SAMPSON
15 CRAIG R. SPIEGEL (122000)
16 HAGENS BERMAN SOBOL SHAPIRO LLP
17 1301 Fifth Avenue, Suite 2900
18 Seattle, Washington 98101
19 Telephone: (206) 623-7292
20 Facsimile No.: (206) 623-0594

21 FRED TAYLOR ISQUITH (*pro hac vice*)
22 MARY JANE FAIT (*pro hac vice*)
23 FRANCIS A. BOTTINI, JR.
24 WOLF, HALDENSTEIN, ADLER,
25 FREEMAN & HERZ
26 270 Madison Avenue
27 New York, NY 10016
28 Telephone: (212) 545-4600
Facsimile: (212) 545-4653

17 Co-Lead Counsel for Plaintiffs

18
19 UNITED STATES DISTRICT COURT
20
21 NORTHERN DISTRICT OF CALIFORNIA

22
23
24
25
26
27
28 IN RE DYNAMIC RANDOM ACCESS
MEMORY (DRAM) ANTITRUST
LITIGATION

Master File No. M-02-1486PJH

MDL No. 1486

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENTS
WITH SAMSUNG AND INFINEON
DEFENDANTS; MEMORANDUM OF
LAW IN SUPPORT THEREOF**

This Document Relates To:

All Direct Purchaser Actions

Time: 9:00 a.m.
Date: May 10, 2006
Judge: Hon. Phyllis J. Hamilton
Courtroom: 3

	TABLE OF CONTENTS	Page
1		
2	I. INTRODUCTION.....	1
3	II. FACTUAL BACKGROUND.....	3
4	III. DISCOVERY CONDUCTED BY PLAINTIFFS	4
5	IV. THE TERMS OF THE SETTLEMENTS.....	6
6	A. The Infineon Settlement.....	7
7	B. The Samsung Settlement.....	8
8	V. THE SETTLEMENTS SHOULD BE PRELIMINARILY APPROVED.....	9
9	VI. THE PROPOSED NOTICE TO CLASS MEMBERS IS ADEQUATE.....	12
10	VII. THE COURT SHOULD PROVISIONALLY CERTIFY THE SETTLEMENT CLASS.....	13
11	A. The Requirements of Rule 23 In the Context of the Settlement Class.....	14
12	B. The Requirements of Rule 23(a) Are Satisfied In This Case.....	15
13	1. The Class Is So Numerous That Joinder of All Members Is Impracticable.....	15
14	2. This Case Involves Questions of Law and Fact Common to the Class.....	16
15	3. The Claims of the Representative Parties are Typical of the Claims of the Class.....	17
16	4. The Representative Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.....	18
17	C. The Proposed Class Satisfies The Requirements Of Rule 23(B)(3).....	19
18	1. Common Questions of Law and Fact Predominate Over Individual Questions.....	19
19	2. A Class Action Is Superior to Other Available Methods for the Fair and Efficient Adjudication of this Case.....	21
20	D. The Court Should Appoint the Plaintiffs' Current Counsel as Counsel for the Class.....	22
21	VIII. CONCLUSION.....	23

o

1

2 **TABLE OF AUTHORITIES**

3

<u>CASES</u>	<u>Page(s)</u>
<i>Armstrong v. Bd. Of School Dir.'s,</i> 616 F. 2d 305 (7 th Cir. 1980).....	2,10
<i>Amchem Prods., Inc. v. Windsor,</i> 521 U.S. 591 (1997).....	15,19,21
<i>Blackie v. Barrack,</i> 524 F.2d 891 (9th Cir. 1975).....	15,16
<i>Carnegie v. Household International, Inc.,</i> 376 F. 3d 656 (7 th Cir. 2004).....	15, 21
<i>Churchill Village, L.L.C. v. General Elec.,</i> 361 F.3d 566 (9 th Cir. 2004).....	10
<i>Estate of Jim Garrison v. Warner Bros., Inc.,</i> 1996 WL 407849 (C.D. Cal. 1996).....	17,21
<i>Flat Glass Cases,</i> 191 F.R.D. at 478.....	16,17
<i>Felzen v. Andreas,</i> 134 F.3d 873, 875 (7 th Cir. 1998).....	2
<i>Fisher Bros. v. Phelps Dodge Industries, Inc.,</i> 604 F.Supp. 446 (E.D. Pa. 1985)	11
<i>Fisher Bros. v. Mueller Brass Co.,</i> 630 F.Supp. 493 (E.D. Pa. 1985).....	11
<i>Hanlon v. Chrysler Corp.,</i> 150 F.3d 1011 (9th Cir. 1998).....	passim
<i>In re Cardizem CD Antitrust Litigation,</i> 200 F.R.D. 326 (E.D. Mich. 2001).....	20
<i>In re Cement and Concrete Antitrust Litig.,</i> 1979 WL 1595 (D. Ariz. 1979).....	20
<i>In re Chlorine & Caustic Soda Antitrust Litig.,</i> 116 F.R.D. 622 (E.D. Pa. 1987).....	18
<i>In re Citric Acid Antitrust Litig.,</i> 1996 WL 655791 (N.D. Cal. 1996).....	14,18,20
<i>In re Corrugated Container Antitrust Litig.,</i> 1981 WL 2093 (S.D. Tex. June 4, 1981).....	11,13

1	<i>In re Flat Glass Antitrust Litigation</i> , 191 F.R.D. 472 (W.D. Pa. 1999).....	16
2		
3	<i>In re Initial Public Offering Securities Litigation</i> , 226 F.R.D. 186.....	15
4		
5	<i>In re Linerboard Antitrust Litigation</i> , 203 F.R.D. 197 (E.D. Pa. 2001).....	11
6		
7	<i>In re Lorazepam & Clorazepate Antitrust Litigation</i> , 202 F.R.D. 12 (D.D.C. 2001).....	20
8		
9	<i>In re Methionine Antitrust Litig.</i> , Master File No. C-99-3491-CRB (N.D. Cal.).....	14
10		
11	<i>In re Mid-Atlantic Toyota Antitrust Litig.</i> , 564 F.Supp 1379, 1386 (D. Md. 1983).....	11
12		
13	<i>In re NASDAQ Market-Makers Antitrust Litigation</i> , 169 F.R.D. 493 (S.D.N.Y. 1996).....	20,21
14		
15	<i>In re Plastic Tableware Antitrust Litig.</i> , 1995 WL 723175, at *1 (E.D. Pa. October 25, 1995).....	11
16		
17	<i>In re Relafen Antitrust Litig.</i> , 231 F.R.D. 52, 68 (D. Mass. 2005)	15
18		
19	<i>In re Rubber Chemicals Antitrust Litigation</i> ____ F.R.D. __, 2005 WL 2649292 (N.D. Cal. 2005).....	passim
20		
21	<i>In re Shopping Carts Antitrust Litig.</i> , 1983 WL 1950, at *9 (S.D.N.Y. Nov. 18, 1983).....	11
22		
23	<i>In re Sodium Gluconate Antitrust Litig.</i> , Master File No. C 97-4142 CW (N.D. Cal.) (Sept. 24, 1998).....	14
24		
25	<i>In re Sorbates Direct Purchaser Antitrust Litig.</i> , Case No. C 98-4886 (N.D. Cal. 2002).....	14
26		
27	<i>In re Sugar Industry Antitrust Litig.</i> , 1976 WL 1374 (N.D. Cal. 1976).....	16,20
28		
29	<i>In re Vitamins Antitrust Litigation</i> 209 F.R.D. 251 (D.D.C. 2002).....	10
30		
31	<i>In Re Warfarin Sodium Antitrust Litig.</i> , 391 F.3d 516, 528 (3 rd Cir. 2004).....	19
32		
33	<i>Lerwill v. Inflight Motion Pictures, Inc.</i> , 582 F.2d 507 (9th Cir. 1978).....	18
34		
35	<i>Local Joint Executive Board of Culinary/Bartender Trust Fund</i> , 244 F.3d at 1163.....	20,22
36		

1	<i>Miller v. Mackey Int'l, Inc.</i> , 452 F.2d 424 (5th Cir. 1971).....	15
3	<i>Mularkey v. Holsum Bakery, Inc.</i> , 120 F.R.D. 118 (D. Ariz. 1988).....	20
4	<i>Northwestern Fruit Co. v. A. Levy & J. Zentner Co.</i> , 116 F.R.D. 384 (E.D. Cal. 1986).....	22
6	<i>Officers for Justice v. Civil Service Com'n</i> , 688 F.2d 615 (9 th Cir. 1982).....	12
7	<i>Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.</i> , 188 F.R.D. 365 (D. Ore. 1998).....	16,18
9	<i>Van Bronkhorst v. Safeco Corp.</i> , 529 F.2d 943 (9 th Cir. 1976).....	10
10	<i>Wellman v. Dickinson</i> , 497 F.Supp. 824 (S.D.N.Y. 1980).....	10
12	<i>Wilkerson v. Martin Marietta Corp.</i> , 171 F.R.D. 273 (D.Colo. 1997).....	12
13		
14	TREATISES	
15	5 Moore's Federal Practice (3d Ed. 2003) at §23.63.....	13
16	Manual for Complex Litigation (Fourth) § 13.14 at 173.....	2,10
18	Newberg on Class Actions (4 th ed.)	12
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 10, 2006, at 9:00 a.m. or at a time subject to the
 3 Court's calendar, before the Honorable Phyllis J. Hamilton, United States District Court, Northern
 4 District of California, 450 Golden Gate Avenue, San Francisco, California, Plaintiffs will and
 5 hereby do move the Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for an
 6 Order: (i) granting preliminary approval of each of the settlement agreements plaintiffs have
 7 executed with (a) defendants Infineon Technologies AG and Infineon Technologies North America
 8 Corp.; and (b) defendant Samsung Semiconductor, Inc.; (ii) certifying a class for settlement
 9 purposes; (iii) approving the manner and forms of giving notice of the settlement agreements to
 10 class members; and (iv) establishing a timetable for publishing the class notice, lodging objections
 11 to the terms of the settlement agreements, if any, and the plan of allocation, and holding a hearing
 12 regarding final approval of the settlement agreements.

13 This motion is based upon this Notice of Motion and Motion, the following Memorandum
 14 of Law, the Declaration of Guido Saveri and the Proposed Order Preliminarily Approving Class
 15 Action Settlements with Infineon and Samsung, the complete files and records in this action, and
 16 such other written or oral arguments that may be presented to the Court.

17 The settlement agreement with the Infineon defendants is attached hereto as exhibit A. The
 18 settlement agreement with defendant Samsung Semiconductor, Inc. is attached as exhibit B.

19 **MEMORANDUM OF LAW**

20 **I. INTRODUCTION**

21 Plaintiffs have entered into separate settlement agreements ("Settlement(s)") with (a)
 22 defendants Infineon Technologies AG and Infineon Technologies North America Corp.
 23 (collectively "Infineon") and (b) defendant Samsung Semiconductor, Inc., ("Samsung")
 24 (collectively "Settling Defendants"). In return for a release of class members' claims, Infineon has
 25 agreed to pay \$20,750,000. Samsung has agreed to pay \$67,000,000. These amounts exceed

10.5% and 12.3 %, respectively, of Settling Defendants' sales of DRAM¹ to class members which
 2 remain in the case.² In addition, Settling Defendants' sales remain in the case for purposes of
 3 computing the treble damages claim against non-settling defendants and Settling Defendants have
 4 agreed to cooperate with plaintiffs in their prosecution of the case against the remaining
 5 defendants. (Samsung Settlement ¶¶ 24, 30; Infineon Settlement ¶¶ 24, 29.) The Settlements were
 6 achieved only after extensive arms-length negotiations and represent outstanding recoveries for the
 7 class.³

8 Through this motion, plaintiffs seek preliminary approval of each of the Settlements. The
 9 Court is not being asked to determine whether the Settlements are fair, reasonable and adequate at
 10 this time. Instead, the question is simply whether the Settlements are sufficiently within the range
 11 of possible approval to justify sending and publishing notice of the Settlements to class members
 12 and scheduling final approval proceedings. *Armstrong v. Bd. Of School Dir.*'s, 616 F. 2d 305, 314
 13 (7th Cir. 1980) (overruled on different grounds in *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir.
 14 1998)); *Manual for Complex Litigation* (Fourth) § 13.14 at 173 ("First, the judge reviews the
 15 proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing.
 16 If so, the final decision on approval is made after the hearing.").

17 If preliminary approval is granted, the proposed settlement class members will be notified
 18 of the terms of the Settlements and informed of their rights in connection therewith, including their
 19 right to appear and be heard at the final approval hearing. The following is a proposed schedule:

20
 21
 22 ¹ "DRAM" means dynamic random access memory components, including without limitation,
 23 synchronous dynamic random access memory ("SDRAM"), Rambus dynamic random access
 24 memory ("RDRAM"), asynchronous dynamic random access memory ("ASYNC"), FPM DRAM,
 EDO DRAM, BEDO DRAM, and double data rate semiconductor devices and modules ("DDR").

25 ² Settling Defendants have entered into settlements with some of their larger customers thus
 26 reducing Settling Defendants' sales at issue in this case. The Settlements allow plaintiffs to verify
 27 the Settling Defendants' sales during the Class Period and their settlements with their customers.
 (Samsung Settlement, ¶¶ 16, 24; Infineon Settlement, ¶¶ 16, 24.) Infineon has also agreed that, if
 28 sales of Infineon products to class members which have not already been settled exceed \$208.1
 million, it will increase its payment by 10.53% of the excess. (Infineon Settlement, ¶ 16.)

³ Plaintiffs are engaged in settlement negotiations with other defendants. If these discussions are
 completed satisfactorily, the parties may ask the Court to address additional proposed settlements
 at the preliminary approval hearing.

	<u>Date</u>	<u>Event</u>
2	May 10, 2006	Hearing on motion for preliminary approval of settlements;
3	May 31, 2006	Mailed notice sent to class members;
4	June 7, 2006	Summary notice published in Wall Street Journal;
5	July 22, 2006	Deadline for opting out of class or objecting to Settlements, or plan of allocation;
7	August 8, 2006	Deadline for filing briefing in support of Settlements, etc.;
8	August 29, 2006	Hearing on final approval of Settlements.

9 Accordingly, plaintiffs seek an order: (i) granting preliminary approval of the Settlements;
10 (ii) certifying the settlement class (the “Class”); (iii) approving the manner and forms of giving
11 notice to the Class; and (iv) establishing the above timetable for consummation of the Settlements.

12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

13 The Third Consolidated Amended Complaint filed on June 30, 2005 (“Complaint”) alleges
14 an over-arching horizontal conspiracy among defendants to fix prices for DRAM and to allocate
15 markets and customers for the sale of DRAM in the United States from April 1, 1999 through
16 June 30, 2002 (the “Class Period”). Plaintiffs and members of the Class were injured because they
17 paid more for DRAM than they would have absent defendants’ illegal conspiracy. (Compl. ¶ 65.)

18 Defendants are domestic and foreign entities that manufactured, marketed, and/or sold
19 DRAM in the United States during the class period.⁴ (Compl. ¶¶ 17-34.) Five defendants –
20 Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., Infineon Technologies AG, Hynix
21 Semiconductor, Inc. and Elpida Memory, Inc. – along with several of their officers, have pled
22 guilty to participating in a price-fixing conspiracy in the DRAM market in violation of criminal

23
24 ⁴ Defendants are Micron Technology, Inc. and its two wholly owned subsidiaries Micron
25 Semiconductor Products, Inc. and Crucial Technology, Inc. (collectively “Micron”); Infineon
26 Technologies AG and its wholly owned subsidiary Infineon Technologies North America Corp.;
27 Hynix Semiconductor, Inc. and its wholly owned subsidiary Hynix Semiconductor America, Inc.;
28 Samsung Electronics Co., Ltd. and its wholly owned subsidiary Samsung Semiconductor, Inc.;
Mosel-Vitelic Corporation and its wholly owned subsidiary Mosel-Vitelic Corporation (USA);
Nanya Technology Corporation and its wholly owned subsidiary Nanya Technology Corporation
USA; Winbond Electronics Corporation and its wholly owned subsidiary Winbond Electronics
Corporation America; Elpida Memory, Inc. and its wholly owned subsidiary Elpida Memory(USA)
Inc.; and NEC Electronics America, Inc. (Comp., ¶¶ 17-34.)

1 antitrust laws. In addition, another defendant – Micron – has announced its cooperation with the
 2 Department of Justice (“DOJ”) investigation.

3 Plaintiffs and members of the Class are direct purchasers of DRAM from defendants and/or
 4 their subsidiaries. (Compl. ¶¶ 6-16.) Plaintiffs seek, among other things, injunctive relief and
 5 treble damages pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.
 6 (Compl., Prayer for Relief, ¶¶ C, D.)

7 III. DISCOVERY CONDUCTED BY PLAINTIFFS

8 The complaints in these actions were filed on or after June 21, 2002 in District Courts
 9 around the country. They were consolidated and transferred to this District by the Judicial Panel
 10 on Multidistrict Litigation. Because the DOJ’s investigation was continuing, general discovery
 11 was stayed until July 14, 2005. Plaintiffs, however, were allowed access to the millions of pages of
 12 documents defendants had produced to the DOJ, and were allowed to propound limited
 13 interrogatories to determine the amount of defendants’ sales during the Class Period.

14 On July 11, 2003, the parties entered into a Stipulation and Protective Order concerning the
 15 disclosure of confidential and highly confidential information. Shortly thereafter, and pursuant to
 16 the Order Limiting the Scope of Discovery, defendants began producing copies of documents they
 17 had turned over to the Grand Jury in response to subpoenas. The defendants’ document production
 18 took place on a rolling basis. To date, defendants have produced over **four million pages** from
 19 both domestic and foreign entities. Many of the documents are in Korean, Japanese, Chinese, and
 20 German and have been translated prior to being indexed, analyzed, and entered into a database.
 21 (Declaration of Guido Saveri in Support of Plaintiffs’ Motion for Preliminary Approval of Class
 22 Action Settlements With Samsung and Infineon (“Saveri Decl.”), ¶3.)

23 Plaintiffs’ counsel dedicated numerous lawyers and paralegals, and considerable other
 24 resources (including third-party vendors and technical staff) to the translation, analysis, and
 25 electronic coding of the documents produced by defendants. During the first phase of the
 26 document review, teams consisting of five to twelve attorneys from various law firms gathered in a
 27 document depository at Cotchett Pitre Simon & McCarthy in Burlingame, California, to review the
 28

1 documents produced by defendants. In total, plaintiffs counsel reviewed and analyzed thousands
 2 of boxes of defendants' documents. (Saveri Decl. ¶4.)

3 During the second phase of the document review, over 20 paralegals at three locations
 4 around the nation inputted and coded the relevant subjective and objective data from the attorney
 5 review into a single, consolidated database. This consolidated database then provided plaintiffs'
 6 counsel the ability to run sophisticated queries regarding the documents and significant issues in
 7 the case. (Saveri Decl. ¶5.)

8 In addition to reviewing the content of all produced documents, plaintiffs organized certain
 9 "key" documents by subject matter category, and documents relating to more than 100 potential
 10 deponents were compiled in preparation for depositions. These efforts were vital to plaintiffs'
 11 preparation of motions, meet and confer efforts, damage analysis, and ability to timely respond to
 12 complex legal and factual issues that arose during this litigation. This type of preparation and
 13 organization has allowed plaintiffs to avoid piecemeal appearances before the Court, and allowed
 14 the Court to concentrate on the outstanding issues presented by this case. It also enhanced
 15 plaintiffs' counsel's negotiations with Settling Defendants as plaintiffs' counsel were armed with a
 16 full understanding of the strengths and weaknesses of their case. (Saveri Decl. ¶5.)

17 Plaintiffs' counsel frequently met and conferred with opposing counsel regarding certain
 18 inadequacies in their document productions, and particularly about defendants' consistent and
 19 uniform refusal to produce documents they claimed were unrelated to the U.S. DRAM market.
 20 (Saveri Decl., ¶6.)

21 In addition to the review of documents produced to the Grand Jury, plaintiffs propounded
 22 separate Requests for Production of Documents and Interrogatories to all defendants. Pursuant to
 23 Judge Spero's February 28, 2006 Discovery Plan Order, all parties were required to complete their
 24 productions and to supplement their interrogatories by March 15, 2006. In response, plaintiffs
 25 have received thousands of pages of additional documents that are currently being reviewed.
 26 (Saveri Decl. ¶7.)

1 Through the diligent analysis of the documents and other evidence produced, plaintiffs
 2 identified more than 100 current and former employees of the defendants with knowledge of the
 3 relevant issues in this case. As a result, plaintiffs have noticed the depositions of approximately 75
 4 witnesses. In July of 2005, plaintiffs also served notices of deposition pursuant to Rule 30(b)(6) on
 5 the domestic and foreign defendants. To date, plaintiffs have taken six depositions of Micron
 6 witnesses, as well as depositions pursuant to Rule 30(b)(6) for three groups of defendants.
 7 Plaintiffs anticipate taking approximately 80 depositions prior to the May 2006 discovery cut-off.
 8 (Saveri Decl. ¶8.)

9 Throughout 2005 and up to the present, plaintiffs' counsel worked extensively with
 10 consultants and experts in preparation for trial and future motions. Plaintiffs' counsel have spent
 11 considerable time working with Professor Roger Noll, an economist, in preparation for the motion
 12 for class certification. (Saveri Decl. ¶9.)

13 On December 8, 2005, plaintiffs filed a motion for class certification. On March 10, 2006,
 14 non-settling defendants filed their joint opposition. A hearing is set for May 17, 2006.

15 After a substantial amount of the discovery and analysis described above had been
 16 completed, as well as a thorough consideration of applicable law, Class counsel began settlement
 17 negotiations with Infineon in August 2004. (Saveri Decl. ¶10.) The negotiations were vigorous
 18 and non-collusive. After numerous face to face meetings and many telephone conferences and
 19 other communications, the Infineon Settlement was concluded on September 2, 2005. (Saveri
 20 Decl. ¶10.)

21 Negotiations with Samsung were similarly protracted and difficult. The first settlement
 22 meeting occurred in June, 2005. Again, after numerous face to face meetings and many telephone
 23 conversations, the Samsung Settlement was concluded on February 24, 2006. (Saveri Decl. ¶12.)

24 Despite the Settlements, Settling Defendants maintain that they have meritorious defenses
 25 to plaintiffs' claims.

26 **IV. THE TERMS OF THE SETTLEMENTS**

27 While the terms of the Settlements are similar, each is completely independent of the other.

1 A. The Infineon Settlement.

2 In exchange for dismissal with prejudice and a release of all claims asserted in the
 3 Complaint, as noted above, Infineon has agreed to pay \$20,750,000 plus 10.53% of the amount by
 4 which their sales to class members which have not already been settled exceed \$208.1 million.
 5 (Infineon Settlement ¶16.) Infineon has already deposited \$20.75 million into an escrow account
 6 earning interest for the benefit of class members.

7 The Infineon Settlement requires the certification of a settlement class consisting of:

8 All individuals and entities who, during the period beginning April 1, 1999 and continuing
 9 through June 30, 2002, purchased DRAM in the United States directly from the defendants
 10 or their subsidiaries. Excluded from the class are defendants and their parents, subsidiaries,
 11 affiliates, all governmental entities, and co-conspirators.

12 (Infineon Settlement ¶¶ 1,9,10.) Upon the Settlement becoming final, plaintiffs and Class members
 13 will relinquish any claims they have against Infineon based, in whole or in part, on matters alleged
 14 or that might have been alleged in this litigation. (Infineon Settlement ¶¶13-15.) The release,
 15 however, excludes claims for product liability or breach of contract, indirect purchaser claims, or
 16 claims based on purchases of DRAM outside the United States. (Infineon Settlement ¶30.) The
 17 Settlement becomes final upon: (i) the Court's approval of the Settlement pursuant to Rule 23(e)
 18 and the entry of a final judgment of dismissal with prejudice as to Infineon; and (ii) the expiration
 19 of the time for appeal or, if an appeal is taken, the affirmance of the judgment with no further
 20 possibility of appeal. (Infineon Settlement ¶11.)

21 The Settlement also requires Infineon to assist plaintiffs in the prosecution of this case
 22 against the remaining defendants by producing documents and making its employees available for
 23 depositions and trial, including supplying witnesses necessary to testify as to the authenticity and
 24 admissibility of documents. (Infineon Settlement ¶24.)

25 Finally, the Settlement provides that Infineon will pay an additional sum of as much as
 26 \$200,000 for notice and administrative costs (Infineon Settlement ¶19.).

27 Subject to the approval and direction of the Court, the Settlement payment, plus accrued
 28 interest thereon, will be used to: (i) make a distribution to Class members in accordance with a

1 proposed plan of allocation to be approved by the Court at final approval based on the dollar value
 2 of each Class members' DRAM purchases proportionate to the total claims filed; (ii) pay Class
 3 Counsel's attorneys' fees, costs, and expenses as may be awarded by the Court; and (iii) pay future
 4 costs incurred in the administration and distribution of the Settlement payments, including the
 5 payment of taxes on any interest earned. (Infineon Settlement ¶¶ 21-23.)⁵

6 **B. The Samsung Settlement.**

7 Samsung has agreed to pay \$67,000,000 to the Class in return for a dismissal with prejudice
 8 and release of itself and its parent, defendant Samsung Electronics Co., Ltd. (Samsung Agreement,
 9 ¶6.) Samsung is required to deposit \$67,000,000 in an interest bearing escrow account within 10
 10 (ten) business days of the filing of this motion. (Samsung Settlement ¶16.)

11 The Settlement requires the certification of a settlement class consisting of:

12 All individuals and entities who, at any time during the period beginning April 1, 1999 and
 13 continuing through June 30, 2002, purchased DRAM in the United States directly from the
 14 defendants or their subsidiaries. Excluded from the class are defendants and their parents,
 15 subsidiaries, affiliates, all governmental entities, and alleged co-conspirators.⁶

16 (Samsung Settlement ¶¶ 1,9,10.) Like the Infineon Settlement, plaintiffs and Class members will
 17 relinquish any claims they have against Samsung based, in whole or in part, on matters alleged or
 18 that might have been alleged in this litigation, excluding claims for product liability or breach of
 19 contract, indirect purchaser claims, or claims based on purchases of DRAM outside the United
 20 States. (Samsung Settlement ¶¶13-15, 31.) The Settlement becomes final upon: (i) the Court's
 21 approval of the Settlement pursuant to Rule 23(e) and the entry of a final judgment of dismissal
 22 with prejudice as to Samsung and related companies; and (ii) the expiration of the time for appeal
 23 or, if an appeal is taken, the affirmance of the judgment with no further possibility of appeal.

24 ⁵ At the present time, Class counsel do not plan to distribute any Settlement funds until the
 25 termination of the case since plaintiffs are continuing to litigate against all non-settling defendants
 26 and since piecemeal distribution of partial settlements is expensive, time-consuming and prone to
 27 confuse Class members. Pending distribution, the Settlement funds will accrue interest for the
 28 benefit of the Class.

29 ⁶ The class definition contained in the Samsung Settlement differs from the one in the Infineon
 30 Settlement in two ways. First, it contains the words "at any time" in the second clause of the first
 31 sentence. Second, the word "alleged" is inserted before the last word of the second sentence.
 32 Plaintiffs believe that these differences are not material. The proposed order of preliminary
 33 approval contains the definition contained in the Infineon Settlement.

1 (Samsung Settlement ¶11.)

2 The Settlement also requires Samsung to assist plaintiffs in the prosecution of this case
 3 against the remaining defendants by producing documents and making its employees available for
 4 depositions and trial, including supplying witnesses necessary to testify as to the authenticity and
 5 admissibility of documents. (Samsung Settlement ¶24.) The Samsung Settlement also authorizes
 6 the use of \$200,000 of the settlement fund for notice and administrative purposes, and \$1 million
 7 for expenses incurred in the prosecution of this case against the remaining defendants. (Samsung
 8 Settlement ¶20.)

9 Subject to the approval and direction of the Court, the Settlement payment, plus accrued
 10 interest thereon, will be used to: (i) make a distribution to Class members in accordance with a
 11 proposed plan of allocation to be approved by the Court at final approval based on the dollar value
 12 of each Class members' DRAM purchases proportionate to the total claims filed; (ii) pay Class
 13 Counsel's attorneys' fees, costs, and expenses as may be awarded by the Court; and (iii) pay future
 14 costs incurred in the administration and distribution of the settlement payments, including the
 15 payment of taxes on any interest earned. (Samsung Settlement ¶¶ 21-23.)

16 Finally, the Samsung Settlement requires plaintiffs to use their "best efforts to negotiate
 17 settlements equal to or in excess of the percentage of remaining non-excluded sales represented in
 18 this settlement" with "comparably situated other major suppliers." (Samsung Settlement ¶ 17.) It
 19 also provides that if Class members who purchased more than 15% of Samsung's remaining sales
 20 opt out of the Settlement Class, "the parties shall meet and confer in good faith in order to
 21 negotiate an appropriate adjustment to the settlement amount in light of such opt-outs. If the parties
 22 are unable to agree, [Samsung] may elect to terminate the Agreement . . ." (Samsung Settlement,
 23 ¶19.)

24 **V. THE SETTLEMENTS SHOULD BE PRELIMINARILY APPROVED**

25 The approval of class action settlements required by Federal Rule of Civil Procedure 23(e)
 26 is a two-step process. Preliminary approval requires only that the terms of the proposed settlement
 27 fall within the "range of possible approval." *Armstrong*, 616 F. 2d at 314. It amounts to a
 28

1 determination that the terms of the proposed settlement warrant consideration by members of the
 2 class and a full examination at a final approval hearing. *Manual for Complex Litigation* (Fourth) §
 3 13.14 at 173. After notice to the class, preliminary approval is followed by a review of the fairness
 4 of the settlement at final approval, and, if appropriate, a finding that it is “fair, reasonable and
 5 adequate.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988). Because it is
 6 provisional, courts grant preliminary approval where the proposed settlement lacks “obvious
 7 deficiencies” raising doubts about the fairness of the settlement. *See e.g., In re Vitamins Antitrust*
 8 *Litig.*, 2001 WL 856292, at *4 (D.D.C. July 25, 2001) (quoting *Manual for Complex Litigation*
 9 (Third) §30.41).

10 It is well-recognized that “[v]oluntary out of court settlement of disputes is ‘highly favored
 11 in the law’ and approval of class action settlements will be generally left to the sound discretion of
 12 the trial judge.” *Wellman v. Dickinson*, 497 F.Supp. 824, 830 (S.D.N.Y. 1980) (citation omitted).

13 It hardly seems necessary to point out that there is an overriding public interest in settling
 14 and quieting litigation. This is particularly true in class action suits which are now an ever
 15 increasing burden to so many federal courts and which frequently present serious problems
 16 of management and expense.

17 *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see also Churchill Village,*
L.L.C. v. General Elec., 361 F.3d 566, 576 (9th Cir. 2004).

18 The Settlements before the Court amply meet the requirements for preliminary approval.
 19 First, the consideration for each Settlement is substantial. The Infineon Settlement provides for a
 20 cash payment of approximately 10.53% of its remaining sales to class members during the Class
 21 Period. The payment required by the Samsung Settlement is approximately 12.3 % of the same
 22 amount. (Saveri Decl., ¶¶ 9, 11) The Settlements therefore compare favorably to settlements
 23 finally approved in other price-fixing cases. *See, e.g., In re Plastic Tableware Antitrust Litig.*,
 24 1995 WL 723175, at *1 (E.D. Pa. October 25, 1995) (3.5% of sales); *In re Linerboard Antitrust*
Litigation, 321 F.Supp. 2d 619, 627 (E. D. Pa. 2004) (1.62% of sales); *In re Shopping Carts*
Antitrust Litig., 1983 WL 1950, at *9 (S.D.N.Y. Nov. 18, 1983) (3% of sales); *Fisher Bros. v.*
Phelps Dodge Industries, Inc., 604 F.Supp. 446, 451 (E.D. Pa. 1985) (3% of sales); *Fisher Bros. v.*

1 *Mueller Brass Co.*, 630 F.Supp. 493, 499 (E.D. Pa. 1985) (recoveries equal to .1%, .2%, 2%, .3%,
 2 .65%, .88%, and 2.4% of defendants' total sales).

3 In *Rubber Chemicals*, a horizontal price fixing case in which some of the defendants had
 4 entered guilty pleas in related criminal proceedings, Judge Jenkins, in the course of granting final
 5 approval, recently characterized a settlement payment of 4% of a defendant's sales as "an excellent
 6 recovery." (Saveri Decl., Ex. A).

7 In addition to these payments, the Settlements provide that the non-settling defendants
 8 remain jointly and severally liable for damages caused by the alleged conspiracy, including those
 9 from sales by the Settling Defendants. (Samsung Settlement ¶ 30; Infineon Settlement ¶ 29.) The
 10 Settlements, therefore, while providing a significant, certain and early recovery for class plaintiffs,
 11 do not reduce the total amount of damages recoverable in the case. *See In re Corrugated*
 12 *Container Antitrust Litig.*, 1981 WL 2093, at *17 (S.D. Tex. June 4, 1981).

13 Finally, both Settlements require Settling Defendants to cooperate in plaintiffs' prosecution
 14 of this case against the remaining defendants. This is a valuable benefit to class members because it
 15 will save time, reduce costs, and provide access to information and documents to which they might
 16 not otherwise have access. *See In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F.Supp 1379, 1386
 17 (D. Md. 1983) (. . . the commitment [the] Distributor defendants have made to cooperate with
 18 plaintiffs will certainly benefit the classes, and is an appropriate factor for a court to consider in
 19 approving a settlement.").

20 The Settlements were the product of intense and thorough arms-length negotiations by
 21 experienced and informed counsel. Each of the negotiations occurred over a span of months and
 22 involved telephonic and face to face meetings. They were contested and conducted in the utmost
 23 good faith. Class counsel negotiated the Settlements based on their review and analysis of millions
 24 of pages of defendants' documents, their own substantial investigations, and the analysis of expert
 25 consultants. (Saveri, Decl. ¶¶ 10-13.) Counsel's judgment that the Settlements are fair and
 26 reasonable is entitled to great weight. *Officers for Justice v. Civil Service Com'n*, 688 F.2d 615,
 27 625 (9th Cir. 1982); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir.
 28

1 2002); *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 288-89 (D.Colo. 1997). Indeed, there
 2 is generally “an initial presumption of fairness when a proposed class settlement, which was
 3 negotiated at arms’ length by counsel for the class, is presented for court approval.” 4 *Newberg on*
 4 *Class Actions* at 11.41 (4th ed.).

5 In light of these risks, and the \$87.75 million in cash payments guaranteed by the
 6 Settlements, it is plain that the Settlements are worthy of preliminary approval. They provide
 7 substantial and certain benefits to the class members and they avoid – at least with regard to
 8 Settling Defendants – the risks, delay and expense of further litigation. And while plaintiffs
 9 believe their case is strong, Settling Defendants have not conceded liability and would vigorously
 10 defend themselves at trial.

11 VI. THE PROPOSED NOTICE TO CLASS MEMBERS IS ADEQUATE

12 Class members are entitled to the “best notice practicable under the circumstances” of any
 13 proposed settlement before it is finally approved by the Court. Federal Rule of Civil Procedure
 14 23(c)(2)(b). The notice must state in plain, easily understood language:

- 15 • the nature of the action,
- 16 • the definition of the class certified,
- 17 • the class claims, issues, or defenses,
- 18 • that a class member may enter an appearance through counsel if the member so
 desires,
- 19 • that the court will exclude from the class any member who requests exclusion,
 stating when and how members may elect to be excluded, and
- 20 • the binding effect of a class judgment on class members under Rule 23(c)(3).

21 *Id.*

22 Plaintiffs propose that direct notice in the form attached as Exhibit A to the Proposed Order
 23 (“Notice”) be given by mail or email to each Class Member who may, by reasonable efforts, be
 24 identified. The Settlements require Settling Defendants to provide lists of all their customers who
 25 are potential class members. (Samsung Settlement ¶ 9; Infineon Settlement ¶ 9.) Additionally,
 26 plaintiffs have filed concurrently with this motion, a Motion to Facilitate Dissemination of Notice
 27 which seeks an order compelling non-settling defendants to provide plaintiffs with a list of all of
 28 their customers who are potential class members.

1 In addition, plaintiffs propose that a Summary Notice in the form attached as Exhibit B to
 2 the Proposed Order be published in the national edition of the Wall Street Journal, and that both
 3 notices, along with the settlement agreements, be posted on a website accessible to class members.
 4 Such notice plans are commonly used in class actions like this one and constitute valid, due and
 5 sufficient notice to class members, and constitute the best notice practicable under the
 6 circumstances. *See, e.g., 5 Moore's Federal Practice* (3d Ed. 2003) at §23.63[8][a], §23.63[8][b];
 7 Saveri Decl. ¶14.

8 The content of the proposed notices complies with the requirements of Rule 23(c)(2)(B).
 9 The Notice clearly and concisely explains the nature of the action and the terms of the Settlements.
 10 It provides a clear description of who is a member of the class and the binding effects of class
 11 membership. It explains how to exclude oneself from the class, how to object to the Settlements,
 12 how to obtain copies of papers filed in the case and how to contact Class counsel.

13 The Summary Notice also identifies class members and explains the basic terms of the
 14 Settlements and the consequences of class membership. It also explains how to obtain more
 15 information about the Settlements. The Summary Notice will be published as soon as reasonably
 16 practicable after preliminary approval and after the Notice is mailed.

17 Plaintiffs will propose to the class that class members share in the Settlements on a
 18 proportionate basis based on the dollar value of each claimant class member's DRAM purchases
 19 during the Class Period compared to the total dollar value of DRAM purchased by all class
 20 members who submit claims. Such a proposed plan of allocation is virtually identical to that
 21 approved in *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 218-220 (5th Cir.
 22 1981).

23 The contents of the notices and the proposed plan of allocation fulfill the requirements of
 24 Rule 23 and due process. Accordingly, the Court should preliminarily approve both.

25 **VII. THE COURT SHOULD PROVISIONALLY CERTIFY THE SETTLEMENT CLASS**

26 The Court should provisionally certify the settlement classes required by the Settlements.
 27 (Samsung Settlement ¶¶ 1, 8-10; Infineon Settlement ¶¶ 1, 8-10.) It is well-established that price-
 28 fixing actions like this one are appropriate for class certification and many courts, including courts

1 in the Northern District of California, have so held. *See, e.g., In re Rubber Chemicals Antitrust*
 2 *Litigation*, 232 F.R.D. 346, 350 (N.D. Cal. 2005) (“*Rubber Chemicals*”); *In re Citric Acid Antitrust*
 3 *Litig.*, 1996 WL 655791 (N.D. Cal. 1996) (“*Citric Acid*”); *In re Sorbates Direct Purchaser*
 4 *Antitrust Litig.*, Case No. C 98-4886 MMC (N.D. Cal.) (Order Granting Plaintiffs’ Motion for
 5 Class Certification; Vacating Hearing (Mar. 11, 2002) (Chesney, J.)) (“*Sorbates*”); *In re*
 6 *Methionine Antitrust Litig.*, Master File No. C-99-3491-CRB (N.D. Cal.) (Order Granting Motion
 7 for Class Certification (Dec. 21, 2000) (Breyer, J.)) (“*Methionine*”); *In Re: Sodium Gluconate*
 8 *Antitrust Litig.*, Master File No. C 97-4142 CW (N.D. Cal.) (Order Granting Class Certification)
 9 (Sept. 24, 1998) (Wilken, J.)) (“*Sodium Gluconate*”).⁷

10 **A. The Requirements of Rule 23 In the Context of the Settlement Class**

11 Rule 23 provides that a court must certify an action as a class action where, as here,
 12 plaintiffs satisfy the four prerequisites of Rule 23(a), and one of the three criteria set forth in Rule
 13 23(b). Rule 23(a) provides that a class may be certified if:

14 (1) the class is so numerous that joinder of all members is
 15 impracticable;
 16 (2) there are questions of law or fact common to the class;
 17 (3) the claims or defenses of the representative parties are typical
 18 of the claims or defenses of the class; and
 19 (4) the representative parties will fairly and adequately protect
 20 the interests of the class.

21 Fed. R. Civ. P. 23(a).

22 Plaintiffs also must satisfy Rule 23(b)(3), which provides that “an action may be maintained
 23 as a class action” if:

24 the court finds that the questions of law or fact common to the
 25 members of the class predominate over any questions affecting only
 26 individual members, and that a class action is superior to other
 27 available methods for the fair and efficient adjudication of the
 28 controversy.

29 The Rule 23(b)(3) “manageability” requirements, however, need not be satisfied in order to

30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700
 701
 702
 703
 704
 705
 706
 707
 708
 709
 710
 711
 712
 713
 714
 715
 716
 717
 718
 719
 720
 721
 722
 723
 724
 725
 726
 727
 728
 729
 730
 731
 732
 733
 734
 735
 736
 737
 738
 739
 740
 741
 742
 743
 744
 745
 746
 747
 748
 749
 750
 751
 752
 753
 754
 755
 756
 757
 758
 759
 760
 761
 762
 763
 764
 765
 766
 767
 768
 769
 770
 771
 772
 773
 774
 775
 776
 777
 778
 779
 780
 781
 782
 783
 784
 785
 786
 787
 788
 789
 790
 791
 792
 793
 794
 795
 796
 797
 798
 799
 800
 801
 802
 803
 804
 805
 806
 807
 808
 809
 810
 811
 812
 813
 814
 815
 816
 817
 818
 819
 820
 821
 822
 823
 824
 825
 826
 827
 828
 829
 830
 831
 832
 833
 834
 835
 836
 837
 838
 839
 840
 841
 842
 843
 844
 845
 846
 847
 848
 849
 850
 851
 852
 853
 854
 855
 856
 857
 858
 859
 860
 861
 862
 863
 864
 865
 866
 867
 868
 869
 870
 871
 872
 873
 874
 875
 876
 877
 878
 879
 880
 881
 882
 883
 884
 885
 886
 887
 888
 889
 890
 891
 892
 893
 894
 895
 896
 897
 898
 899
 900
 901
 902
 903
 904
 905
 906
 907
 908
 909
 910
 911
 912
 913
 914
 915
 916
 917
 918
 919
 920
 921
 922
 923
 924
 925
 926
 927
 928
 929
 930
 931
 932
 933
 934
 935
 936
 937
 938
 939
 940
 941
 942
 943
 944
 945
 946
 947
 948
 949
 950
 951
 952
 953
 954
 955
 956
 957
 958
 959
 960
 961
 962
 963
 964
 965
 966
 967
 968
 969
 970
 971
 972
 973
 974
 975
 976
 977
 978
 979
 980
 981
 982
 983
 984
 985
 986
 987
 988
 989
 990
 991
 992
 993
 994
 995
 996
 997
 998
 999
 1000
 1001
 1002
 1003
 1004
 1005
 1006
 1007
 1008
 1009
 10010
 10011
 10012
 10013
 10014
 10015
 10016
 10017
 10018
 10019
 10020
 10021
 10022
 10023
 10024
 10025
 10026
 10027
 10028
 10029
 10030
 10031
 10032
 10033
 10034
 10035
 10036
 10037
 10038
 10039
 10040
 10041
 10042
 10043
 10044
 10045
 10046
 10047
 10048
 10049
 10050
 10051
 10052
 10053
 10054
 10055
 10056
 10057
 10058
 10059
 10060
 10061
 10062
 10063
 10064
 10065
 10066
 10067
 10068
 10069
 10070
 10071
 10072
 10073
 10074
 10075
 10076
 10077
 10078
 10079
 10080
 10081
 10082
 10083
 10084
 10085
 10086
 10087
 10088
 10089
 10090
 10091
 10092
 10093
 10094
 10095
 10096
 10097
 10098
 10099
 100100
 100101
 100102
 100103
 100104
 100105
 100106
 100107
 100108
 100109
 100110
 100111
 100112
 100113
 100114
 100115
 100116
 100117
 100118
 100119
 100120
 100121
 100122
 100123
 100124
 100125
 100126
 100127
 100128
 100129
 100130
 100131
 100132
 100133
 100134
 100135
 100136
 100137
 100138
 100139
 100140
 100141
 100142
 100143
 100144
 100145
 100146
 100147
 100148
 100149
 100150
 100151
 100152
 100153
 100154
 100155
 100156
 100157
 100158
 100159
 100160
 100161
 100162
 100163
 100164
 100165
 100166
 100167
 100168
 100169
 100170
 100171
 100172
 100173
 100174
 100175
 100176
 100177
 100178
 100179
 100180
 100181
 100182
 100183
 100184
 100185
 100186
 100187
 100188
 100189
 100190
 100191
 100192
 100193
 100194
 100195
 100196
 100197
 100198
 100199
 100200
 100201
 100202
 100203
 100204
 100205
 100206
 100207
 100208
 100209
 100210
 100211
 100212
 100213
 100214
 100215
 100216
 100217
 100218
 100219
 100220
 100221
 100222
 100223
 100224
 100225
 100226
 100227
 100228
 100229
 100230
 100231
 100232
 100233
 100234
 100235
 100236
 100237
 100238
 100239
 100240
 100241
 100242
 100243
 100244
 100245
 100246
 100247
 100248
 100249
 100250
 100251
 100252
 100253
 100254
 100255
 100256
 100257
 100258
 100259
 100260
 100261
 100262
 100263
 100264
 100265
 100266
 100267
 100268
 100269
 100270
 100271
 100272
 100273
 100274
 100275
 100276
 100277
 100278
 100279
 100280
 100281
 100282
 100283
 100284
 100285
 100286
 100287
 100288
 100289
 100290
 100291
 100292
 100293
 100294
 100295
 100296
 100297
 100298
 100299
 100300
 100301
 100302
 100303
 100304
 100305
 100306
 100307
 100308
 100309
 100310
 100311
 100312
 100313
 100314
 100315
 100316
 100317
 100318
 100319
 100320
 100321
 100322
 100323
 100324
 100325
 100326
 100327
 100328
 100329
 100330
 100331
 100332
 100333
 100334
 100335
 100336
 100337
 100338
 100339
 100340
 100341
 100342
 100343
 100344
 100345
 100346
 100347
 100348
 100349
 100350
 100351
 100352
 100353
 100354
 100355
 100356
 100357
 100358
 100359
 100360

1 certify a class in the settlement context: “Confronted with a request for settlement-only class
 2 certification, a district court need not inquire whether the case, if tried, would present intractable
 3 management problems, . . . for the proposal is that there be no trial.” *Amchem Products, Inc. v.*
 4 *Windsor*, 521 U.S. 591, 620 (1997); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 68 (D. Mass.
 5 2005) (same). As Judge Posner has explained, manageability concerns that might preclude
 6 certification of a litigated class may be disregarded with a settlement class “because the settlement
 7 might eliminate all the thorny issues that the court would have to resolve if the parties fought out
 8 the case.” *Carnegie v. Household International, Inc.*, 376 F. 3d 656, 660 (7th Cir. 2004) (citing
 9 *Amchem*, 521 U.S. at 620; *see also In re Initial Public Offering Securities Litigation*, 226 F.R.D.
 10 186, 190, 195 (settlement class may be broader than litigated class because settlement resolves
 11 manageability/predominance concerns).

12 A Rule 23 determination is procedural and does not concern whether a plaintiff will
 13 ultimately prevail on the substantive merits of his or her claims. *Blackie v. Barrack*, 524 F.2d 891,
 14 901 (9th Cir. 1975), *cert. den’d*, 429 U.S. 816 (1976). In ruling on a motion for class certification,
 15 the substantive allegations in plaintiffs’ complaint must be accepted as true. *Id.*; *Rubber*
 16 *Chemicals*, 232 F.R.D at 350. Therefore, the only issue on a motion for class certification is
 17 whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of
 18 Rule 23. *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156, 178 (1974), *quoting, Miller v. Mackey*
 19 *Int’l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971).

20 **B. The Requirements of Rule 23(a) Are Satisfied In This Case.**

21 **1. The Class Is So Numerous That Joinder of All Members Is Impracticable**

22 The first requirement for maintaining a class action under Rule 23 is that the class be so
 23 numerous that joinder of all members would be “impracticable.” Fed. R. Civ. P. 23(a)(1). To
 24 satisfy this prerequisite, plaintiffs need not allege the precise number or identity of class members.
 25 *Rubber Chemicals*, 232 F.R.D. at 350 (“Plaintiffs do not need to state the exact number of potential
 26 class members, nor is a specific number of class members required for numerosity.”); *In re Sugar*
 27 *Industry Antitrust Litig.*, 1976 WL 1374 at *12 (N.D. Cal. 1976) (same). Rather, a finding of
 28

1 numerosity may be supported by common sense assumptions. *Rubber Chemicals*, 232 F.R.D. at
 2 350; *Citric Acid*, 1996 WL 655791 at *3.

3 Courts have not defined the exact number of putative class members that is required for
 4 class certification but have generally found that the numerosity requirement is satisfied when class
 5 members exceed forty. 6 Alba Conte & Herbert B. Newberg, *Newberg On Class Actions* §18:4 (4th
 6 ed. 2002); *see also Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris*,
 7 *Inc.*, 188 F.R.D. 365, 372-73 (D. Ore. 1998). Geographic dispersal of plaintiffs may also support a
 8 finding that joinder is “impracticable.” *Rubber Chemicals*, 232 F.R.D. at 350-51.

9 In this case, defendants’ customer lists indicate that the Class contains thousands of
 10 members dispersed across the country. (Saveri Decl. ¶19.) Thus, the proposed Class readily
 11 satisfies the numerosity requirement of Rule 23.

12 **2. This Case Involves Questions of Law and Fact Common to the Class**

13 The second requirement for class certification under Rule 23 is that “there are questions of
 14 law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). A court must assess if “the class is
 15 united by a common interest in determining whether a defendant’s course of conduct is in its broad
 16 outlines actionable.” *Blackie*, 524 F.2d at 902. This requirement, however, is easily met: it is
 17 satisfied by the existence of a single common issue. *In re Flat Glass Antitrust Litig.*, 191 F.R.D.
 18 472, 478 (W.D. Pa. 1999).

19 The commonality requirement is readily satisfied here. “Courts consistently have held that
 20 the very nature of a conspiracy antitrust action compels a finding that common questions of law
 21 and fact exist.” *Rubber Chemicals*, 232 F.R.D. at 351 (quoting *In re Sugar Industry*, 1976 WL
 22 1374 at *13)(internal quotations omitted).

23 Here, there are numerous questions of law and fact common to the Class which are at the
 24 heart of this case. They include:

25 (1) whether defendants and their co-conspirators conspired to
 26 raise, fix, stabilize or maintain the prices of DRAM sold in
 the United States;
 27 (2) whether the alleged conspiracy violated Section 1 of the
 Sherman Act;

- (3) the duration and extent of the conspiracy;
- (4) whether defendants' conduct caused prices of DRAM to be set at artificially high and non-competitive levels; and
- (5) whether defendants' conduct injured Plaintiffs and other members of the Class and, if so, the appropriate class-wide measure of damages.

These issues constitute a common core of questions focusing on the central issue of the existence and effect of the alleged conspiracy and plainly satisfy the commonality requirement of Rule 23(a)(2). *Estate of Jim Garrison*, 1996 WL 407849 at *2 (Plaintiffs' allegations "which constitute the classic hallmark of antitrust class actions under Rule 23 . . . are more than sufficient to satisfy the commonality requirement"); *Flat Glass*, 191 F.R.D. at 479 ("[g]iven plaintiffs' allegation of a § 1 conspiracy, the existence, scope and efficacy of the alleged conspiracy are certainly questions that are common to all class members.")

3. The Claims of the Representative Parties are Typical of the Claims of the Class

The third requirement for maintaining a class action under Rule 23(a) is that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” “[R]epresentative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020. “Typicality determines whether a sufficient relationship exists between the injury to the named Plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.” *Oregon Laborers-Employers*, 188 F.R.D. at 373-74 (internal quotations and citations omitted).

Courts have generally found the typicality requirement to be satisfied in horizontal price-fixing cases. As explained in *In re Chlorine & Caustic Soda Antitrust Litig.*:

Plaintiffs seek to recover treble damages from defendants measured by the alleged overcharge resulting from defendants' conspiracy to fix prices. In order to prevail on the merits in this case the plaintiffs will have to prove the same major elements that the absent members of the class would have to prove. Those elements are a conspiracy, its effectuation and resulting damages. As such, the claims of the plaintiffs are not antagonistic to and are typical of the claims of the other putative class members.

1 116 F.R.D. 622, 626 (E.D. Pa. 1987); *see also* *Rubber Chemicals*, 232 F.R.D. at 351; *Citric Acid*,
 2 1996 WL 655791 at *3 (“The alleged underlying course of conduct in this case is defendants’
 3 conspiracy to fix the price of citric acid and to allocate customers among themselves . . . The legal
 4 theory Plaintiffs that rely on is antitrust liability. Because plaintiffs and all class members share
 5 these claims and this theory, the representatives’ claims are typical of all.”).

6 Plaintiffs here allege a conspiracy to fix, raise, maintain and stabilize the price of DRAM.
 7 Class members’ claims are based on the same legal theories. Plaintiffs would have to prove the
 8 same elements that absent members would have to prove: the existence, scope, and efficacy of the
 9 conspiracy. The typicality requirement of Rule 23(a)(3) is plainly satisfied.

10 **4. The Representative Plaintiffs Will Fairly and Adequately Protect the Interests
 11 of the Class**

12 The fourth requirement of Rule 23 mandates that the representative plaintiff fairly and
 13 adequately represent the class. Fed. R. Civ. P. 23(a)(4). The adequacy requirement consists of two
 14 separate inquiries. First, the representative plaintiffs must not possess interests which are
 15 antagonistic to the interests of the class. Second, plaintiffs must be represented by counsel of
 16 sufficient diligence and competence to fully litigate the claim. *Hanlon*, 150 F.3d at 1020; *Lerwill*
 17 *v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

18 The representative plaintiffs here meet both aspects of the adequacy test. There are no
 19 actual or potential conflicts of interest between the representative parties and the members of the
 20 class. Plaintiffs, as well as each member of the class, were overcharged for DRAM and have a
 21 mutual interest in establishing liability and recovering damages. The gravamen of the claims
 22 against defendants is a price-fixing conspiracy that artificially raised the prices charged to every
 23 Class member, each of whom directly purchased DRAM from one or more of the defendants
 24 during the Class Period. Defendants, therefore, allegedly injured plaintiffs and the Class members
 25 in the same manner. Plaintiffs seek relief substantially identical to that sought by every other Class
 26 member. Accordingly, the interests of the representative plaintiffs and the putative class members
 27 in recovering the overcharges are the same.

1 Moreover, plaintiffs have retained highly capable and well-recognized counsel with
 2 extensive experience in antitrust cases. Plaintiffs' counsel have successfully prosecuted numerous
 3 antitrust class actions on behalf of injured purchasers throughout the United States. Plaintiffs'
 4 counsel are capable of, and committed to, prosecuting this action vigorously on behalf of the Class.
 5 Plaintiffs' counsel's prosecution of this case, and, indeed, the Settlements, amply demonstrate their
 6 diligence and competence. (See Saveri Decl. ¶¶ 3-13)

7 The named plaintiffs satisfy the requirements of Rule 23(a)(4).

8 **C. The Proposed Class Satisfies The Requirements Of Rule 23(B)(3)**

9 Once it is determined that the proposed class satisfies the requirements of Rule 23(a), a
 10 class must be certified under Rule 23(b)(3) if "the court finds that the questions of law or fact
 11 common to the members of the class predominate over any questions affecting only individual
 12 members, and that a class action is superior to other available methods for the fair and efficient
 13 adjudication of the controversy." "Judicial economy and fairness are the focus of the
 14 predominance and superiority requirements." *Oregon Laborers-Employers*, 188 F.R.D. at 375.
 15 Plaintiffs' claims meet these requirements.

16 **1. Common Questions of Law and Fact Predominate Over Individual
 17 Questions**

18 As the United States Supreme Court has noted, predominance is a test that is "readily met"
 19 in antitrust cases. *Amchem Prods.*, 521 U.S. at 625; *see also In Re Warfarin Sodium Antitrust
 20 Litig.*, 391 F.3d 516, 528 (3rd Cir. 2004). The overwhelming weight of authority holds that in
 21 horizontal price-fixing cases, the predominance requirement is readily satisfied.

22 In determining whether common questions predominate in a price fixing case, "the focus of
 23 this court should be principally on issues of liability." *In re Sugar Industry*, 1976 WL 1374 at *22;
 24 *Citric Acid*, 1996 WL 655791 at *6; *see also Local Joint Executive Board of Culinary/Bartender
 25 Trust Fund v. Las Vegas*, 244 F.3d 1152, 1163 (9th Cir. 2001); *Hanlon*, 150 F.3d at 1022
 26 ("common nucleus of facts and potential legal remedies dominates this litigation"). Common
 27 questions need only predominate; they do not need to be dispositive of the litigation as a whole.

1 *Lorazepam*, 202 F.R.D. at 29; *In re Cardizem CD Antitrust Litigation*, 200 F.R.D. 326, 339 (E.D.
 2 Mich. 2001); *Potash* 159 F.R.D. at 693. The predominance standard is met “unless it is clear that
 3 individual issues will overwhelm the common questions and render the class action valueless.” *In*
 4 *re NASDAQ Market-Makers Antitrust Litigation*, 169 F.R.D. 493, 517 (S.D.N.Y. 1996).

5 In section 1 Sherman Act class cases, the existence of a conspiracy has been recognized as
 6 the overriding issue common to all plaintiffs. As the court acknowledged in *Rubber Chemicals*:
 7 “the great weight of authority suggests that the dominant issues in cases like this are whether the
 8 charged conspiracy existed and whether price-fixing occurred.” 232 F.R.D. at 353 (quoting *Citric*
 9 *Acid*, 1006 U.S. Dist. Lexis 16409 at *21); *see also In re Cement and Concrete*, 1979 WL 1595 at
 10 *2 (“the asserted nationwide price fixing conspiracy presents questions of law and fact common to
 11 the class members which predominate over any questions affecting only individual members”); *In*
 12 *re Sugar Industry*, 1976 WL 1374 at *23 (“It is the allegedly unlawful horizontal price-fixing
 13 arrangement among defendants that, in its broad outlines, comprises the predominating, unifying
 14 common interest as to these purported Plaintiff representatives and all potential class members”);
 15 *Mularkey v. Holsum Bakery, Inc.*, 120 F.R.D. 118, 122 (D. Ariz. 1988). Courts in this district and
 16 elsewhere have held that this issue alone is sufficient to satisfy the Rule 23(b)(3) predominance
 17 requirement. *See, e.g., Rubber Chemicals*, 232 F.R.D. at 353; *Citric Acid*, 1996 WL 655791 at *8.

18 Furthermore, courts have uniformly found predominant common questions of law or fact
 19 with respect to the existence, scope, and effect of the alleged conspiracy. *See In re Citric Acid*,
 20 1996 WL 655791 at *6 (common questions include whether there was a conspiracy, whether prices
 21 were fixed pursuant to the conspiracy, and whether the prices plaintiffs’ paid were higher than they
 22 should have been); *Estate of Jim Garrison*, 1996 WL 407849 at *3 (“Antitrust price fixing
 23 conspiracy cases by their nature deal with common legal and factual questions of the existence,
 24 scope and effect of the alleged conspiracy.” (citation omitted)); *In re NASDAQ Market-Makers*
 25 *Antitrust Litg.*, 169 F.R.D. at 518.

26 Common issues relating to the existence and effect of the conspiracy predominate over any
 27 questions arguably affecting only individual Class members because they are the central issue in
 28

1 the case and proof is identical for every member of the Class. If separate actions were to be filed
 2 by each Class member, each would have to establish the existence of the same conspiracy and
 3 would depend on identical evidence, and each would prove damages using identical "textbook"
 4 economic models. These issues pose predominant common questions of law and fact.

5 Finally, as explained above, the Court need not concern itself with questions of the
 6 manageability of a trial because the Settlements dispose of the need for a trial with regard to
 7 Settling Defendants, along with any "thorny issues" that might arise. *See Amchem*, 521 U.S. at
 8 620; *Carnegie*, 376 F. 3d at 660.

9 **2. A Class Action Is Superior to Other Available Methods for the Fair and
 10 Efficient Adjudication of this Case**

11 Rule 23(b)(3) provides that certification of a case is appropriate if class treatment "is
 12 superior to other available methods for the fair and efficient adjudication of the controversy." It
 13 sets forth four factors to be considered: (1) the interest of members of the class in individually
 14 controlling the prosecution of separate actions; (2) the extent and nature of any litigation
 15 concerning the controversy already commenced by members of the class; (3) the desirability of
 16 concentrating the litigation of the claims in a particular forum; and (4) the difficulties likely to be
 17 encountered in the management of a class action. Fed. R.Civ.P. 23(b)(3). Prosecuting this action
 18 as a class action is clearly superior to other methods of adjudicating this matter.

19 The alternative to a class action – many duplicative individual actions – would be
 20 inefficient and unfair. "Numerous individual actions would be expensive and time-consuming and
 21 would create the danger of conflicting decisions as to persons similarly situated." *Lerwill*, 582 F.2d
 22 at 512. Further, it would deprive many class members of any practical means of redress. Because
 23 prosecution of an antitrust conspiracy case against economically powerful defendants is difficult
 24 and expensive, class members with all but the largest claims would likely choose not to pursue
 25 their claims. *See Local Joint Executive Board of Culinary/Bartender Trust Fund*, 244 F.3d at 1163.
 26 Most class members would be effectively foreclosed from pursuing their claims absent class
 27 certification. *Hanlon*, 150 F.3d at 1023 ("many claims [that] could not be successfully asserted

1 individually ... would not only unnecessarily burden the judiciary, but would prove uneconomic
 2 for potential plaintiffs"); *Northwestern Fruit Co.*, 116 F.R.D. at 389 ("Multiple lawsuits . . . would
 3 be costly and inefficient, and the exclusion of every class member that cannot afford separate
 4 representation would be neither 'fair' nor an 'adjudication' of their claims.").⁸

5 The proposed class satisfies the requirements of Rule 23(b)(3).

6 **D. The Court Should Appoint the Plaintiffs' Current Counsel as Counsel for the
 7 Class**

8 Fed. R. Civ. P. 23(c)(1)(B) states that "[a]n order certifying a class action . . . must appoint
 9 class counsel under Rule 23(g)." Rule 23(g)(1)(C) states that "[i]n appointing class counsel, the
 10 court (i) must consider: [1] the work counsel has done in identifying or investigating potential
 11 claims in the action, [2] counsel's experience in handling class actions, other complex litigation,
 12 and claims of the type asserted in the action, [3] counsel's knowledge of the applicable law, [4] the
 13 resources counsel will commit to representing the class."

14 The current co-lead counsel, Saveri & Saveri, Inc.; Hagens Berman Sobol Shapiro LLP;
 15 and Wolf, Haldenstein, Adler, Freeman & Herz seek to be appointed as Counsel for the Class.
 16 Pursuant to this Court's order, these firms have served as co-lead counsel thus far and are willing
 17 and able to vigorously prosecute this action and to devote all necessary resources to obtain the best
 18 possible result. The work done to date supports the conclusion that they should be appointed as
 19 Class Counsel for purposes of the Settlements.⁹ Each firm meets the criteria of
 20 Rule 23(g)(1)(C)(i).¹⁰

21 **IV. CONCLUSION.**

22 For the foregoing reasons, plaintiffs respectfully submit that the Court should grant
 23 preliminary approval to the Settlements, conditionally certify the settlement Class, and order that
 24 notice be given to the Class and a hearing on final approval be scheduled according to the schedule

25
 26 ⁸ In this regard, it is worth noting that the defendants who have thus far pled guilty to criminal
 27 violations of the antitrust laws avoided restitution to their victims based in part on the expectation
 28 of a recovery in this action.

⁹ See, e.g., *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 520 (D.N.M. 2004).

¹⁰ See note 7 above. Cf. *Farley v. Baird, Patrick & Co., Inc.* 1992 WL 321632*5 (S.D.N.Y. 1992)
 ("[c]lass counsel's competency is presumed absent specific proof to the contrary by defendants").

1 set forth above.

2 Dated: March 31, 2006

3 Respectfully submitted,

4 /s/ Guido Saveri

5 Guido Saveri (22349)
6 R. Alexander Saveri (173102)
7 Geoffrey C. Rushing (126910)
8 Cadio Zirpoli (179108)
9 SAVERI & SAVERI, INC.
10 111 Pine Street, Suite 1700
11 San Francisco, CA 94111-5619
12 Telephone: (415) 217-6810
13 Facsimile: (415) 217-6813
14 *guido@saveri.com*
15 *rick@saveri.com*

16 Steve W. Berman (*pro hac vice*)
17 Anthony D. Shapiro (*pro hac vice*)
18 George W. Sampson
19 Craig R. Spiegel (122000)
20 HAGENS BERMAN SOBOL SHAPIRO LLP
21 1301 Fifth Avenue, Suite 2900
22 Seattle, Washington 98101
23 Telephone: (206) 623-7292
24 Facsimile No.: (206) 623-0594

25 Fred Taylor Isquith (*pro hac vice*)
26 Mary Jane Fait (*pro hac vice*)
27 WOLF, HALDENSTEIN, ADLER,
28 FREEMAN & HERZ
29 270 Madison Avenue
30 New York, NY 10016
31 Telephone: (212) 545-4600
32 Facsimile: (212) 545-4653

33 Co-Lead Counsel for Plaintiffs